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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require that operators of cable television systems devote channels to programmers favored by Congress—*i.e.*, local broadcast stations—regardless of the preferences of the operators and regardless of the effects on other, unfavored programmers.

PARTIES TO THE PROCEEDINGS

Plaintiffs:

Atlanta Interfaith Broadcasters, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services
International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC Network
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Network

Defendants:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative

Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32. It is reprinted in the Appendix to the Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Timely notices of appeal were filed in the district court on May 3, 1993. *See* J.S. App. 73a-81a. Appellants filed a Jurisdictional Statement in this Court on July 2, 1993. This Court noted probable jurisdiction on September 28, 1993.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise

provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 2284]."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted in the Joint Appendix at pages 3 through 33.

STATEMENT

Appellants brought this action before a three-judge district court seeking to enjoin enforcement of various provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), 47 U.S.C. §§ 531 *et seq.*[1] Appellants' principal challenge was directed at the so-called "must-carry" provisions, 47 U.S.C. §§ 534, 535, which require that cable operators carry the programming of commercial and noncommercial broadcast stations. Appellants contended that the provisions violated appellants' right to freedom of speech and of the press under the First Amendment. The district court, by a 2-1 vote, upheld the provisions.

[1] The district court consolidated five separate actions, including one filed by appellant National Cable Television Association, Inc., challenging provisions of the Act. The claims with respect to the must-carry provisions of the Act were assigned, as required by Section 23 of the Act, to a three-judge district court. *See* 47 U.S.C. § 555(c)(1).

1. a. Cable television is a medium for providing programming to television viewers. As one court of appeals has explained, a cable system, in addition to original programming, "offers local over-the-air broadcast signals captured by a strategically located master antenna, distant broadcast signals, which are often imported via satellite, and non-broadcast signals transmitted exclusively to cable systems by satellite or microwave relay. The cable operator converts the signal received from these or other sources into an electronic impulse and delivers it to subscribers' homes over a coaxial cable." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-39 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Cable television is not subject to the physical limitations that have placed a finite upper limit on the number of broadcast stations possible in each local community: most, if not virtually all, communities have the room—on utility poles or below ground—to accommodate the construction of additional cable systems. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (cable operators not subject to physical scarcity as are broadcasters). Each cable operator, however, has limited capacity within its own system. For this and other reasons, cable operators must select what programming to include on their systems and what programming to leave out, tailoring their program mix to meet viewer interests. In addition, cable operators must choose the channel position to be assigned to each programmer carried on the system and the terms on which that programmer will be offered to subscribers in an attempt to create the most attractive package of news, information, and entertainment.[2]

[2] Cable operators typically offer a "basic" tier of program services that all subscribers receive. Additional tiers and services are then available on an optional basis. A decision to place programming within the basic tier thus directly controls whether all subscribers will view the programming for the minimum monthly charge or whether they must elect to add the programming at additional cost.

Cable programmers, in turn, must compete for a place on each cable system. At present, for example, there are more than 75 nonbroadcast providers of programming on a national basis to cable television operators, as well as numerous regional nonbroadcast providers of cable programming.[3] While television stations can, through use of the government-granted spectrum, reach most or all of the homes in their service areas through over-the-air transmission, cable programming networks have no access to the airwaves. It is, therefore, of vital importance to cable programmers that they be selected for placement on one of the limited number of channels provided to viewers by each cable system and other multichannel providers. Indeed, given the need for a critical mass of viewers, a cable programmer cannot survive if it fails to gain access to a significant number of cable systems.

b. Beginning more than 30 years ago, the federal government has repeatedly sought to dictate the choices made by cable operators with respect to programming, requiring them to carry local broadcast stations in preference to competing programming. *See Quincy Cable TV, Inc. v. FCC*, *supra*. In 1985, the Court of Appeals for the District of Columbia Circuit held that must-carry rules promulgated by the Federal Communications Commission violated the First Amendment rights of both cable programmers and cable operators. Pointing out that "the rules are explicitly designed to 'favor[] certain classes of speakers over others,' " 768 F.2d at 1451 (quoting *Home*

[3] This number has risen sharply as the subscribership to cable television has increased. (In 1976, for example, there were four national cable program networks. Cable Television Developments, October 1992, at 7-A.) These programming sources include such well-recognized offerings as HBO, C-SPAN, ESPN, CNN, and the Discovery Channel, as well as recently-developed sources such as the Cartoon Network and the Sci-Fi Channel. In addition, cable operators increasingly are developing their own programming for distribution to their subscribers, as Time Warner Cable has done with New York 1, a 24-hour local news service produced and offered by its cable systems in the New York City area.

Box Office, Inc. v. FCC, 567 F.2d at 48), and that "[t]he rules coerce speech," *id.* at 1452, the court determined that the asserted justifications for the rules did not justify the degree of intrusion on First Amendment interests. The court found insufficient evidence that "an unregulated cable industry presents a serious threat to local broadcasting," *id.* at 1459, and concluded that, in any event, the rules were " 'grossly' overinclusive." *Id.* at 1460. Although the purported basis for the rules was "to protect local broadcast*ing* and not local broadcast*ers*," *id.*, the court observed that "[t]he rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." *Id.*

The Commission thereafter redrafted the must-carry rules, and the court of appeals once more invalidated them, again emphasizing a lack of factual support. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). Noting that "[t]he Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts," *id.* at 303, the court found that "[e]xperience belies that assertion." *Id.* Rather, the court stated, "during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*." *Id.* The court also pointed to separate reports by the Federal Trade Commission and the Justice Department concluding "that the absence of must-carry would not harm local broadcasting." *Id.*

2. The statute here at issue was enacted by Congress in 1992. In terms even more sweeping than the earlier rules, it compels cable operators to carry a specific number of local broadcast stations—depending upon the number of channels on the cable system—regardless of the

preferences of operators and viewers and regardless of the effects on other programmers. Although Congress made findings with respect to economic factors such as a "shift in market share" from broadcast to cable television (*see* Findings ¶ 13), it made clear, as well, that the must-carry provisions were intended to promote "unique noncommercial, educational programming" (*id.* ¶ 7), assure "programming that is responsive to the needs and interests of the local community" (*id.* ¶ 8(B)), support "local origination of programming" (*id.* ¶ 10), and preserve local broadcast stations as "an important source of local news and public affairs programming" (*id.* ¶ 11).[4]

The principal must-carry provisions are contained in two sections of the Act: Section 4, which deals with carriage of commercial stations, and Section 5, which deals with carriage of noncommercial stations. Section 4(b) of the Act requires that cable systems with more than 12 usable activated channels—the vast majority of cable systems throughout the country—allocate up to one-third of their channels for the carriage of local commercial television stations. *See* 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(c) (requirements for carriage of low power television stations). Systems with 12 or fewer channels but with more than 300 subscribers must carry at least three local commercial television stations. *Id.* § 534(b)(1)(A).

Additional channels—over and above the one-third cap of Section 4(b)—must be devoted to carriage of educational television stations under Section 5(b) of the Act. That section requires that, subject to certain limitations, a

[4] These findings appear in numbered paragraphs in Section 2(a) of the 1992 Act, reprinted in 47 U.S.C. § 521 Historical and Statutory Notes and in the Joint Appendix at pages 3 through 8.

The committee reports confirm the focus on the content of programming, asserting that if broadcasters are not carried the result will be "reductions in local news, public affairs, and other public interest programs . . . ." H.R. Rep. No. 628, 102d Cong., 2d Sess. 51-52 (1992). *See also id.* at 69 (naming with approval several specific programs offered on public television stations).

cable operator shall carry "any qualified local noncommercial educational television station requesting carriage." In particular, cable systems with more than 36 channels must show the programming of *all* noncommercial broadcast stations requesting carriage, unless the programming of a station "substantially duplicates" the programming of another station carried by the system. *See In the Matter of the Implementation of the Cable Television Consumer Protection and Competition Act of 1992* (Broadcast Signal Carriage Issues) Docket No. 92-259, released March 29, 1993, ¶ 19 (defining "substantially duplicates" to mean a 50% overlap in programming). Moreover, the Act mandates carriage of any qualified educational station carried as of March 29, 1990, regardless of the channel capacity of the system.

The effect of these provisions, taken together, is significant. For a cable system of 36 channels, the Act requires carriage of up to 12 local broadcast stations and three educational stations—in essence asserting government control over more than 40 percent of its channels.[5] Furthermore, the Act interferes directly with decisions of the cable operator about the channels on which to place the stations (*see* Sections 4(b) and 5(a)) and mandates their inclusion in the basic tier (Section 3(b)(7)(i))—which must, by law, be provided to all subscribers before they can purchase any other tier of programming (§ 3(b)(7)(A)). As a result, the broadcast stations not only benefit from mandatory carriage, regardless of interest in the community, but from mandatory carriage to all subscribers in a preferred position.

[5] These requirements are in addition to those of the Cable Communications Policy Act of 1984 ("the 1984 Cable Act"), which requires cable operators to relinquish editorial and business control over (1) an unlimited number of channels (to be determined by franchising authorities) for public, educational and governmental access channels (Section 611(b)) and (2) up to 15% of capacity for leased access by persons unaffiliated with the operator (Section 612(b)(1)).

The must-carry provisions also are linked to an additional set of provisions: the retransmission consent provisions, set forth in section 6 of the Act. *See* 47 U.S.C. § 325(b). Having mandated carriage of signals by cable operators, the Act nonetheless allows commercial broadcasters the alternative of refusing to allow carriage without payment. Under the Act, local commercial broadcast stations may elect either to assert their rights of mandatory carriage *or* to bar cable reception of their signals absent consideration satisfactory to the station.

3. A divided three-judge district court, convened pursuant to Section 23 of the 1992 Cable Act (47 U.S.C. § 555(c)(1)), upheld the must-carry requirements against appellants' First Amendment challenge.[6] The majority first took the view that Congress was regulating "a market in a commercial commodity . . . ; not a market in 'speech.'" J.S. App. 12a. Regarding the law as "simply industry-specific antitrust and fair trade practice regulatory legislation," *id.* at 13a, the court said that "to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information." *Id.* Indeed, despite the fact that the must-carry provisions dictate what programming cable operators must place on their systems, the court concluded that the provisions are "unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver." *Id.*

[6] The court also rejected, without comment, appellants' challenges to the tiering and channel positioning requirements and, with brief comment (J.S. App. 7a n.10), appellants' challenge to the retransmission consent provisions. In the event that this Court holds that the must-carry provisions are unconstitutional, we believe that the tiering and channel positioning requirements, which expressly apply to carriage of signals pursuant to the must-carry obligations, must fall as well. We believe that issues relating to the retransmission consent provisions should be remanded to the district court for further consideration.

The district court did acknowledge that it was too late to reconsider the proposition "[t]hat the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable industry component." J.S. App. 13a. In keeping with its belief that the must-carry requirements were "essentially, economic regulation" (*id.* at 15a), however, the court refused to subject them to strict judicial scrutiny. *See id.* at 15a-16a (provisions must only "satisfy the criteria established in [*United States v.*] *O'Brien* [, 391 U.S. 367 (1968)] and its progeny"). Rejecting the argument of cable operators that strict scrutiny is required for laws compelling speech, the court held that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized *only* if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." J.S. App. 16a (emphasis added). The court similarly rejected the argument, advanced by cable programmers, that strict scrutiny was necessary for laws impeding some speakers in order to advance other speakers, stating that "[s]peaker partiality alone . . . , absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." *Id.* at 18a. Finally, although not entirely clear on the point, the court appeared to conclude that, because of "certain characteristics unique to the way the industry has evolved and is presently structured," *id.* at 20a, it was appropriate to have "relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related . . . ." *Id.* at 22a n.25.

The court then determined that, under its more lenient standard of review, the requirements were adequately jus-

tified. Even though appellants had pointed out that local broadcast stations had *increased* in number since invalidation of the prior must-carry rules—indicating that the system of local broadcasting was still not in any jeopardy (*see Century Communications Corp. v. FCC*, 835 F.2d at 303)—the district court responded that "Congress . . . did not agree." J.S. App. 24a. Because Congress had assembled evidence "demonstrating, to its [own] satisfaction" that cable operators posed a threat to local broadcast stations, *id.* at 24a-25a, the court believed that "the deference [it] should accord to the factfinding abilities of the nation's legislature" required it to "conclude that the danger perceived by Congress is real and substantial." *Id.* at 26a (citations omitted). The court extended a comparable degree of deference with respect to the need for "prophylactic measures," *id.* at 27a, saying that it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective." *Id.*[7]

Judge Williams dissented. He noted that the must-carry provisions (unlike the leased access provisions enacted in 1984) "extend the privilege of access only to a special class of unaffiliated programmers—local commercial and non-commercial television stations," J.S. App. 51a, and that "Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content." *Id.*; *see also id.* at 53a ("Here . . . the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy"). Turning to the proper standard of judicial review, Judge Williams concluded that

[7] In a concurring opinion, Judge Sporkin termed appellants' attempts to invoke First Amendment rights "mischievous," J.S. App. 47a. Judge Sporkin stated that "[i]t is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted." *Id.*

the "proper test is strict scrutiny." *Id.* at 57a. He reasoned that "the statute is content-based under controlling precedent. The must-carry provisions mandate speech: they require cablecasters to carry the speech of local broadcast stations." *Id.* at 54a. Although Judge Williams noted that less exacting scrutiny was given to general laws regulating conduct and having only an "incidental" effect on speech, J.S. App. 54a, he concluded: "The treatment of First Amendment values as irrelevant cannot be transported to the context of a burden imposed on one set of speakers for the direct and explicit advantage of a limited class of their competitors—a class whose programming must, as a matter of law, include content of a type specified by the government." *Id.* at 57a.

Judge Williams then determined that the interests advanced in support of the law were inadequate to justify it. With respect to the asserted interest in "promoting diversity of views," J.S. App. 58a, Judge Williams found that "the fit between the interest and the regulation is extremely weak," *id.*, saying, *inter alia*, that "[b]ecause cablecasters now carry the vast majority of local stations . . . , the must-carry rules may have little effect, but where they have any, it will be only to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." J.S. App. 58a. With respect to the asserted interest in "the preservation of local broadcasting," *id.*, at 60a, Judge Williams expressed doubt that the goal of promoting local programming would qualify as a legitimate compelling interest, given that government typically cannot select the issues to be communicated to the public and given that less restrictive means (like direct subsidies) are available to Congress. And, while he "assume[d] . . . as an abstract matter" that the interest in preserving access to free television is compelling, he found "no evidence that this access is in jeopardy." J.S. App. 61a-62a; *see also id.* at 65a ("we have *nothing* to

connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcast is imminent or serious").[8]

SUMMARY OF ARGUMENT

1. This case involves a direct regulation of the content of fully protected speech: specifically, an order by government to a private entity (here, in fact, an arm of the press) to distribute speech selected by the government. Except in the unique circumstances involving regulation of broadcast licensees—circumstances that, as we later discuss, do not apply to cable television (*see Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449-50 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986))—the Court has given exacting scrutiny to laws that seek to control the choices made by the press, or members of the public, about whether to speak and what to say. *See, e.g., Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795-801 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943). Thus, "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2542 (1992).

Although the district court thought strict scrutiny inappropriate unless "the government has prescribed the content—either the message or the subject matter—of the speech to be spoken," J.S. App. 16a, there is no such exception to the presumption against laws telling individuals or members of the press what they must say. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind*, 487 U.S. at 796-97. Just as a law dictating the message or subject matter of speech interferes with that freedom, so does a law requiring one speaker to utter the speech of another. "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) (internal quotation marks omitted).

The law also discriminates between classes of private speakers, forcing cable operators to give preference to the speech of broadcast stations over the speech of competing cable programmers. This discrimination, likewise, is subject to strict scrutiny. *Burson v. Freeman*, 112 S. Ct. 1846, 1855 (1992). Although Congress may at times have no choice but to favor particular speakers, in the process of administering public funds or public property, here it is distorting the *private* marketplace for speech, commanding that favored speakers be given a preferred position, regardless of the effect on other unfavored speakers. Whatever Congress may believe about the importance of "local news and public affairs programming and other local broadcast services critical to an informed electorate," Findings ¶ 11, it may not advance that speech by insisting that cable operators relegate other programmers to second-class status. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

2. None of the attempts to justify more lenient scrutiny for the must-carry law withstands analysis. It is

[8] Judge Williams also considered, and rejected, the notion that cable television should be given the lesser degree of protection afforded to broadcasters, which make use of the scarce electromagnetic spectrum (*see National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)). In light of less restrictive alternatives like leased access channels, Judge Williams saw no basis on which "Congress can constitutionally deny cable operators the ordinary rights of any First Amendment speaker." J.S. App. 71a.

well-established, of course, that Congress can subject members of the press to "generally applicable economic regulations" (*Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983))—for example, tax laws and labor laws applicable to businesses generally, whether part of the press or not—without having to demonstrate a compelling interest. But it is equally clear that a law applicable *only* to the press, and one that directly controls the content of speech offered by the press, is not such a law. Nor is the must-carry law subject to relaxed scrutiny on the ground that it can be "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted). That test—which serves to identify laws that, while not overtly interfering with the content of speech, are nonetheless enacted for that purpose—does not apply to laws that on their face directly and explicitly alter the content of speech. And, even if the test did apply, the must-carry law would fail it: because Congress has made specific findings about the value of the speech it favors, it cannot be said that the justification "ha[s] nothing to do with content." *Boos v. Barry*, 485 U.S. 312, 320 (1988); *see Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992).

There is also no reason to accord cable operators and programmers the lesser First Amendment rights attributed to holders of broadcast licenses. As this Court has recognized, the government plays a unique role in assigning the scarce electromagnetic frequencies to broadcast stations. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Because there are more willing users of the spectrum than frequencies to accommodate them, and because no speech at all would be heard absent allocation of the spectrum, the government *must* decide who will speak and who will not. That rationale does not apply to the franchising of cable television systems: the physical capacity for additional cable

systems exists but willing users do not. While cable operators typically do make use of public rights-of-way, that usage by itself does not permit government to dictate the content of speech carried on the cable systems, any more than licensing laws allow government to control the content of newspapers sold in newsboxes on public streets. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). And, as this Court made clear in *Miami Herald Publishing Co. v. Tornillo*, the fact that a locality may have only one cable system—as, indeed, most localities have only one newspaper—does not mean that government can require access to that system for speech that it deems worthy of wider circulation.

3. Although the must-carry law is properly subject to strict scrutiny, it could not pass muster even under the more forgiving standard applied by the court below. The first interest asserted in defense of the statute—that Congress wishes to assure greater diversity in the marketplace for speech—is merely another version of the interest asserted in every case of compelled speech: that Congress wishes particular speech (or particular speakers) to receive a wider audience. Even if that interest is legitimate, and thus could be served by subsidies or other direct assistance, it is not sufficient, by itself, to justify the means of telling private speakers that they must carry the speech. The second asserted interest—that Congress wants to preserve a system of free television—does little to support an across-the-board command to carry individual stations, given that cable systems already carry most stations in their local communities. Even leaving aside the deference accorded to Congress by the district court—a deference that is unwarranted in the context of heightened judicial scrutiny—it is absolutely clear that *voluntary* carriage of broadcast stations has been enough to assure that local broadcasting is in no imminent danger. This fact is confirmed by the decision of Congress, contemporaneous with imposition of the must-carry requirements, to grant local

commercial broadcast stations the right to *refuse* carriage by cable systems in their local communities.

ARGUMENT

I. THE MUST-CARRY LAW IS SUBJECT TO STRICT SCRUTINY

The must-carry law, on its face, is a direct, purposeful regulation of the content of fully protected speech. The law tells a cable operator that its programming *must* include the stations specified by Congress, even though the operator would not voluntarily carry such programming and even though its forced inclusion may lead to the exclusion of programming unfavored by Congress. This sort of compelled speech—along with its opposite, prohibited speech—has traditionally received the most exacting scrutiny under the First Amendment. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[t]he government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). Notwithstanding appellees' efforts to say otherwise, that exacting scrutiny must be applied here.

A. The First Amendment, Absent Extraordinary Circumstances, Bars Laws Prohibiting Speech or Mandating Speech or Discriminating on the Basis of Content

1. "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us . . . ." *Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). As this Court said in *Riley v. National Fed'n of the Blind*, 487 U.S. at 790-91, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." For

that reason, it has long been established that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991).

The most familiar form of content-based regulation, of course, is censorship, efforts by government to *suppress* speech. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989). But this Court has recognized that attempts to compel speech carry the same presumption of invalidity. While noting that "[t]here is certainly some difference between compelled speech and compelled silence," the Court nonetheless has observed that, "in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind*, 487 U.S. at 796-97.[9] This freedom, by its very terms, is not limited to particular speakers or particular speech: "*all* speech inherently involves choices of what to say and what to leave unsaid." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion).[10] Because "[m]andating speech that a

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[9] The Court has made clear, on numerous occasions, that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Along with the right not to be silenced, "'[t]here is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Id.* at 559 (quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968)).

[10] The Court has allowed somewhat greater latitude for laws compelling statements in the area of commercial speech. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). It is clear, however, that the programming on cable television may not generally be treated as commercial speech. *See*

speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Fed'n of the Blind*, 487 U.S. at 785, laws that do so are regarded as "content-based." *Id.*

The Court has found the same right to be inherent in freedom of the press.[11] Pointing to its longstanding concern about any "compulsion exerted by government on a newspaper to print that which it would not otherwise print," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256, the Court has said that "[t]he clear implication" of its prior cases was "that any such compulsion to publish that which '"reason" tells them should not be published' is unconstitutional." *Ibid.* (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)). Although the Court in *Tornillo* recognized that the law at issue (a statute requiring newspapers to print replies by political candidates to criticism in their pages) might provide newspaper readers with a greater diversity of views—one of the justifications offered here for the must-carry law—it nonetheless concluded that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258.[12]

Leathers v. Medlock, 111 S. Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment").

[11] The Court has said that a cable operator "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. at 1442.

[12] The exercise of editorial discretion, of course, is not unique to newspapers. As the Court has recognized, "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators must exercise "a significant amount of editorial discretion regarding what their programming will include").

The must-carry law, however, deliberately and explicitly seeks to set aside this freedom of choice in favor of making cable operators the bearers of speech that the government wishes to advance. The law, in purpose and effect, is no different from a law providing that, with respect to the designated channels, "local broadcast stations shall have an absolute right to determine the news, entertainment, and information that may be shown to the public." Like speakers subject to a board of censorship, the right of cable operators to select their own programming has been made secondary to the preferences of entities designated by the government. Whether looked at as an abrogation of their editorial discretion, or as an infringement of their right to speak only as they voluntarily would choose, the law pays little respect to longstanding principles of freedom of speech and of the press.

The district court determined, however, that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized *only* if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." J.S. App. 16a (emphasis added). But there is no support for the notion that government may coerce speech so long as it specifies the content in general, rather than specific, terms. Indeed, if full protection under the First Amendment depended upon whether "the government has prescribed the content—either the message or the subject matter—of the speech to be spoken," *id.*, then it would follow that the government, without strict judicial review, could direct every newspaper to commit a section of its pages to material submitted by particular writers, or compel bookstores to carry works published by "local" authors, or movie theatres to show films produced by

designated movie studios. Under the theory adopted by the district court, none of those mandates would dictate the "message or subject matter" of the speech, yet each would cut deeply into the traditional right of newspapers, booksellers, and movie theatres to choose what they will offer to the public. The freedom not to speak under "compulsion exerted by government" (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256) is a freedom from the compulsion itself: it does not vary according to how precisely the government defines the particular speech to be compelled. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973) ("[f]or better or for worse, editing is what editors are for; and editing is selection and choice of material").[13]

The only authority cited by the district court to support its novel theory, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), provides no support at all. There, the Court simply held that the owner of a shopping center—property generally open to the public for a variety of uses—could not exclude members of the public wishing to use the premises to distribute speech. But that situation was very different: the owner of the shopping center was not itself distributing speech, and the state law at issue thus did not alter the content of its speech. Here, by contrast, Congress has mandated access to a *medium of speech* and, further, has mandated that access for specific programming. The channels of a cable system are not premises on which people come and go but—like the pages of a newspaper, or the stage of a theatre—are the

[13] The Court has held that even indirect compulsion of speech violates the First Amendment. *See Keller v. State Bar*, 110 S. Ct. 2228 (1990); *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Court said in *Abood*—quoting Thomas Jefferson—that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." 431 U.S. at 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)).

very means by which the cable operator conveys its chosen speech to the public. *See* J.S. App. 13a ("video signals have no other function than to convey information.") Those means being central to the act of speaking itself, the government cannot appropriate them, directly or indirectly, for the benefit of speech that it prefers.

2. This Court has also held that government cannot discriminate against certain topics or speakers, simply because it finds the speech or the speakers less worthy of public attention. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. at 508-09; *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). By its terms, however, the must-carry law creates two distinct classes of speech—speech carried on local broadcast stations and all other speech available to cable operators—and grants the first class a preference at the expense of the second. That preference not only erects significant obstacles between cable programmers and their intended viewers, forcing them to compete for carriage on a restricted number of channels, but it inevitably will cause some programmers to be denied carriage entirely.[14] A law that "distinguish[es] among types of speech" is itself subject to strict scrutiny. *Burson v. Freeman*, 112 S. Ct. at 1855.

The district court nevertheless declined to give strict scrutiny to this discrimination, saying that such scrutiny was triggered only by "evidence that the government's distinction between groups of speakers is related to what

[14] In *Miami Herald Publishing Co. v. Tornillo*, the Court acknowledged that "since the amount of space a newspaper can devote to 'live news' is finite, if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else." 418 U.S. at 257 n.22 (internal footnote and quotation omitted). Given the number of programming choices potentially available to cable operators, both now and in the future, the same displacement necessarily will occur with respect to cable systems as well. *See* NCTA's Statement of Material Facts as to Which There Is No Genuine Issue ¶ 8. J.A. 214-18.

the speakers are saying . . . ." J.S. App. 18a. But the presumption against discrimination does not turn on whether the government prefers the speakers, rather than their speech. The infirmity in either case is that government ultimately controls what speech is made available to the public—making it easier for some speech, and harder for other speech, to be heard—and does so on the basis of its views about what is important, or not important, for the public to hear. As this Court has said, however, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley v. Valeo*, 424 U.S. at 48-49. Furthermore, in practical terms, it is almost always the case that the preference of government for one speaker over another *will* be "related to what the speakers are saying." That is especially so here: Congress is favoring that class of speakers subject to federal oversight by virtue of their receipt of broadcast licenses, an oversight that justifies a unique level of federal involvement with programming. And Congress gave explicit approval to the general nature of broadcast speech in explaining its mandatory preferences. *See* pages 29-30 *infra*.[15]

It is true, of course, that the government, in order to administer government funds or government property, sometimes *must* discriminate among various speakers: for example, the federal government could not select among competing applicants for government grants, or provide support for the Corporation for Public Broadcasting,

[15] Appellee NAB, in its Motion to Affirm, argued that Congress is free to discriminate "[s]o long as [it] does not aim at the suppression of dangerous ideas . . . ." NAB Motion to Affirm at 22 (internal quotation marks omitted). But, as the Court stated last Term in *City of Cincinnati*, "we [have] expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" 113 S. Ct. at 1516 (quoting *Simon & Schuster*, 112 S. Ct. at 509).

without some capacity to make distinctions among different speakers. But the power asserted here is very different. Congress is not making an unavoidable choice in its role as overseer of public funds or property; instead, it is reaching out to alter the choices made by *private* entities in the *private* marketplace for speech. That kind of discrimination is what this Court has rightly condemned as intolerable under the First Amendment. *See Buckley v. Valeo*, 424 U.S. at 48-49.

Our position, therefore, is that the must-carry law—as a direct regulation of the content of speech—must be held unconstitutional on its face "'absent a need to further a state interest of the highest order.'" *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). Before turning to the justifications asserted here—the promotion of diversity and the protection of local broadcasting—we address various arguments that a lesser First Amendment standard, or no standard at all, should apply.

B. There Is No Basis for Giving Less Than Exacting Scrutiny to Direct Regulation of the Content of Protected Speech

1. The district court regarded the must-carry law as "essentially economic regulation," J.S. App. 13a, characterizing it as "simply industry-specific antitrust and fair trade practice regulatory legislation." J.S. App. 13a. It is well-established, of course, that legislatures have broad power to regulate businesses generally and that economic regulation is typically subjected to minimal judicial scrutiny. But it is likewise the case that legislative efforts to regulate the press have traditionally been viewed with great suspicion under the First Amendment. This Court has reasonably accommodated both of these principles by holding, on the one hand, that it will usually engage in deferential review when "generally applicable economic regulations" are applied to the press but, on the other hand, that it will undertake strict scrutiny when legisla-

tures "single out" the press for targeted, industry-specific legislation. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) *with Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).[16]

The must-carry law plainly falls on the suspect side of that line: it is *not* a neutral law of general application but a law directly regulating cable operators in their selection of speech. Reviewing "decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," *Cohen v. Cowles Media Co.*, 111 S. Ct. at 2518, the Court has provided an illustrative list of what is meant by "generally applicable laws": laws providing for grand jury subpoenas (*Branzburg v. Hayes*, 408 U.S. 665 (1972)); copyright laws (*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)); the National Labor Relations Act (*Associated Press v. NLRB*, 301 U.S. 103 (1937)); the Fair Labor Standards Act (*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)); the antitrust laws (*Associated Press v. United States*, 326 U.S. 1 (1945)); and non-discriminatory tax laws (*Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).[17] All of those laws, without exception, apply to a broad category of businesses as

[16] The Court has likewise upheld laws of general applicability against claims that the laws violate rights under the Free Exercise Clause. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). At the same time, however, it has emphasized that "[a] law burdening religious practices that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993).

[17] Finding the Minnesota law of promissory estoppel to be a general law, the Court in *Cohen v. Cowles Media Co.* stated: "It does not target or single out the press. Rather . . . the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota." 111 S. Ct. at 2518-19.

businesses, and none singles out the press in ways that control the content of its speech. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 583 ("[t]he cases approving such economic regulation . . . emphasized the general applicability of the challenged regulation *to all businesses*") (emphasis added). *See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465 n.3 (1991) (Scalia, J., concurring in judgment) ("[a] law is 'general' for the present purposes if it regulates conduct without regard to whether that conduct is expressive"). Here, by contrast, the unmistakable object of the must-carry law is to control the choice of programming by cable operators.[18]

The line drawn between general and specific laws serves an important function: it reflects the very different degrees to which the two types of law threaten freedom of speech and of the press. Because a general law applies broadly to entities other than the press, and thus typically to activities other than speech, it is usually too blunt a tool for compelling, prohibiting, or otherwise interfering with the content of speech itself. As the Court noted in *Minneapolis Star & Tribune*, "[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." 460 U.S. at 585 (citing *Railway Express Agency, Inc. v. New York*, 336 U.S.

[18] The Court has held that a law requiring professional fundraisers to charge no more than a reasonable fee—a considerably less intrusive regulation than one actually dictating the content of speech—was not "merely economic, having only an indirect effect on protected speech." *See Riley v. National Fed'n of the Blind*, 487 U.S. at 789 n.5. In so doing, the Court observed that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech . . . . Here, the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others." *Id. See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 581; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. at 509.

106, 112-13 (1949) (Jackson, J., concurring)). Even with respect to general prohibitory laws—laws, like the antitrust laws, that are applied on a discretionary basis to individual cases—the necessary application of the statute to other activities will provide a benchmark by which to identify any arbitrary application to activities involving speech. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988) ("the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the [officials'] occasional speech-related decision"); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. at 2464 (Scalia, J., concurring in judgment). These safeguards are wholly absent when legislatures enact laws that mark out the press, or activities involving speech, in ways that directly or indirectly control the content of what may be said.[19]

The decision to subject those "in the business of expression" (*see City of Lakewood*, 486 U.S. at 761) to targeted legislation also undermines the presumption, reasonably followed in the case of generally applicable laws, that the legislature is engaged in neutral economic regulation. In the vast majority of industries, any concerns about concentrations of economic power—whether in the form of "bottlenecks" or otherwise—are simply addressed under the general antitrust laws, not through unique legislation aimed at the industry as a whole. When Congress departs from the usual pattern, and does so in an industry

[19] The Court has held that, in some circumstances, even laws of general applicability may impose an impermissible burden on First Amendment rights. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *See also Associated Press v. United States*, 326 U.S. at 20 n.18 (emphasizing that antitrust decree "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published"); *Branzburg v. Hayes*, 408 U.S. at 681 (making clear that subpoenas to testify "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold").

involving speech alone, it is necessary to question whether Congress is seeking to impose more onerous standards on the press, or to advance interests related to the speech itself and not just to the economic playing field. Thus, although there conceivably may be sufficient reasons for singling out the press, the explanations put forward for laws of that nature should be subject to the most rigorous form of judicial scrutiny.

The decision in *Leathers v. Medlock* is not to the contrary. The law at issue there—one imposing the Arkansas state sales tax—*was* a general law, not a law imposed only on the press, *see* 111 S. Ct. at 1444 ("[t]he Arkansas sales tax is a tax of general applicability"); it was thus plain that the State could not use the sales tax itself to regulate the content of speech. This Court nonetheless conducted a further inquiry into whether the legislature, by a series of exemptions, had turned a neutral law into one posing improper risks of interference with the content of speech, ultimately concluding that it had not. *See id.* at 1447 (nothing in record "indicate[s] that Arkansas' broad-based content-neutral sales tax is likely to stifle the free exchange of ideas"). The must-carry law is different from the Arkansas law in at least two decisive respects: it is not a law "of general applicability," and, far from imposing little or no risk of interference with freedom of speech, it interferes directly and overtly with that freedom. That kind of law remains subject to the highest, not the lowest, standard of scrutiny.

2. The district court acknowledged that "content-based" laws are subject to strict scrutiny, J.S. App. 16a, but it then concluded that the must-carry law was not content-based because, according to the court, it can be "*justified* without reference to the content of the regulated speech." *See Ward v. Rock Against Racism*, 491 U.S. at 791 (internal quotation marks omitted). This analysis puts the cart before the horse. The purpose of the test relied on by the district court is to determine whether

laws ostensibly regulating conduct (*e.g.*, the burning of a draft card [20] or sleeping in a public park [21]) or the time, place, and manner of speech (*e.g.*, the noise level at public concerts [22]) are entitled to lenient scrutiny or whether —because, though seemingly neutral, their aim is to control the content of speech—they must be reviewed according to the traditional, more exacting standard. The test thus serves to identify laws that are permissible in form, but impermissible in object.[23] But where a law on its face directly and explicitly alters the content of speech, as the must-carry law unmistakably does, the nature of the regulation itself is enough to establish that strict scrutiny is necessary, regardless of the non-speech justifications that the government may advance. *See Riley v. National Fed'n of the Blind*, 487 U.S. at 795 ("mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.").[24]

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[20] *See United States v. O'Brien*, 391 U.S. 367 (1968).

[21] *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

[22] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[23] In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court did look to the justification for a zoning ordinance restricting the location of theatres showing indecent films in order to see whether its aim was to control the effects associated with those theatres or to inhibit the speech itself. But the Court has observed that the ordinance, unlike the must-carry law here, "did not fall neatly into the 'content-based' or 'content-neutral' category . . . ." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. at 1517. Moreover, the law on its face merely assigned adult theatres to designated areas—a time, place and manner regulation—and did not dictate what the content of the films was to be.

[24] In *Riley*, while assessing the requirement that professional fundraisers disclose the percentage of collected funds actually remitted to charity, the Court looked first to the nature of the

In any event, the terms of the law itself make it impossible to justify "without reference to the content of the regulated speech." The very purpose of the law is to assure that particular speech (that of local broadcast stations) is widely available to the public, and the means used are mandatory directives to cable operators to carry that speech in addition to, or instead of, other speech. Even Congress' asserted interest "in promoting the continued availability of . . . free television programming, especially for viewers who are unable to afford other means of receiving programming," Findings ¶ 12, rests upon a legislative judgment that the content of broadcast programming merits governmental support. Through Section 5 of the 1992 Act—the provisions requiring carriage of noncommercial stations—Congress expressly sought to ensure dissemination of speech that "educat[es]" citizens in a manner endorsed by the government, *id.* ¶ 8(A); similarly, Congress found commercial broadcasting worthy of support because broadcasters present "local news and public affairs programming and other local broadcast services critical to an informed electorate," *id.* ¶ 11. *See also* S. Rep. No. 92, 102d Cong., 1st Sess. 59 (1991) (expressing concern that failure of broadcasters will reduce "local public service programming" and "lead to diminished diversity of opinion"); H.R. Rep. No. 628, 102d Cong., 2d Sess. 64 (1992) (same). Against this background of express findings with respect to the values of broadcast programming, it is impossible to conclude that the justifications for the law "have nothing to do with content." *Boos v. Barry*, 485 U.S. at 320; *see*

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regulation (mandated speech) and concluded that it was "content-based." 487 U.S. at 795; *see id.* at 798 ("North Carolina's content-based regulation is subject to exacting First Amendment scrutiny"). Only *after* reaching this conclusion did the Court turn to the justification for the statute: assuring that donors made informed contributions. *Id.* at 798-801; *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. at 508 (law on its face deemed "content-based statute").

Forsyth County, Ga. v. Nationalist Movement, 112 S. Ct. at 2403.

It should also be noted that the speech favored by Congress is the speech over which the federal government exerts the most direct and indirect control. *See, e.g.*, 47 U.S.C. § 303b(a)(2) (children's programming); Pub. L. No. 102-356, § 16(a), 106 Stat. 954, Aug. 26, 1992, to be codified at 47 U.S.C. § 303 (Indecent Programming Restrictions). This mixture of favoritism and control raises concerns for several reasons. At the very least, it means that Congress has reserved to itself the power to regulate programming shown on a significant percentage of channels on cable television, a power that it would be denied if the channels were given over to programming from sources other than broadcast licensees. In addition, because it is well-understood that Congress can revoke its favor at any time, the grant of preferences to broadcast licensees assures that those licensees must continually be sensitive to their political standing among members of Congress. This attention on self-interest, however natural, cannot help but reduce the traditional independence of the press, even the broadcast press, with respect to government.

3. The district court also indicated that certain "local" factors, including the use of public rights-of-way, might justify greater regulation of the content of cable operators' speech. J.S. App. 20a-22a. To the extent that the court believed that cable operators' use of rights-of-way was equivalent to broadcast licensees' use of the electromagnetic spectrum, its belief was mistaken. The federal government has been permitted broad regulatory authority over holders of broadcast licenses because the number of applicants far exceeds the limited capacity of the electromagnetic spectrum: given that unregulated speech by all would amount to speech by none, the government *must* pick and choose among potential speakers to make speech possible over that medium of communication. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990). The situation with respect to the use of public rights-of-way by cable systems is just the reverse: the physical capacity to accommodate additional cable systems exists, but willing users do not. *See* NCTA's Statement of Material Facts as to Which There Is No Genuine Issue ¶ 20, J.A. 211; *see Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1448-50. The federal government is not acting here as an arbiter of last resort but, rather, is reaching out to impose its preferences for particular speakers in the marketplace at large.

The fact that cable operators commonly use rights-of-way does not, by itself, give Congress broad leeway to prescribe the content of speech. Even if local governments may refuse to allow use of public rights-of-way for speech—a proposition open to serious question (*see City of Los Angeles v. Preferred Communications, Inc.*)—it would not follow that they (or the federal government) could turn consent to the laying of cable wires into a basis for dictating the speech carried over those wires.[25] Indeed, recent decisions make it quite clear that the power to ban use of public rights-of-way for speech is not a license for officials to grant or withhold permission based on the content of the speech to be provided. *See City of Cincinnati v. Discovery Network, Inc.; City of Lakewood v. Plain Dealer Publishing Co.* To the contrary, the Court in those cases has recognized that the legitimate interests in con-

[25] Local governments clearly have some power to regulate use of public rights-of-way: whether or not they have an important interest in prohibiting use of public rights-of-way in the first place, they clearly may impose reasonable restraints on the time, place, and manner of use. But, as we discuss in the text, the Court recognized in *City of Lakewood* and *City of Cincinnati* that those possible interests do not relieve government of the responsibility to apply its regulations impartially, without interference with the content of speech.

trolling use of public rights-of-way typically do not vary with the speech at issue. *See also Forsyth County, Ga. v. Nationalist Party*. Likewise, there is no basis for a city to say that it will allow cable operators to lay cable lines but only on condition that they are willing to carry programming selected by the government.[26]

The district court also noted, in its catalogue of "local" factors, that there is "little competition among 'local' cable operators themselves." J.S. App. 20a. But a lack of local competition is not a basis for giving relaxed scrutiny to laws aimed at the content of speech: it is, in fact, common for local communities to have only one newspaper, or one bookstore, or one movie theatre, yet the Court has never suggested that the extent of First Amendment protection is thereby disminished. At most, the absence of other outlets would be an added ground in support of the argument that the chosen means (compelled speech) are necessary to serve the asserted interest (wider dissemination of particular speech). In a "one-newspaper" town, for example, local officials would still have to meet a compelling-interest standard to justify a law requiring the newspaper to print the minutes of town meetings; but, in seeking to meet that standard, the officials could point to the absence of other newspapers to explain why their "must-carry" rule was needed to have an informed citizenry. The lack of other comparable means for distributing the speech might affect the result

[26] This Court has recognized that governments may limit use of government resources to the purpose for which they were granted. *See Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). But the franchises provided to cable operators are not—and, indeed, could not be—granted for the purpose of conveying speech designated by the government. A must-carry requirement, therefore, does not prevent cable operators from taking property provided for one purpose and converting it to a second purpose; rather, it allows government to leverage a legitimate power (over public property) into an illegitimate one (over private speech).

of the test—although we think that it generally would not—but it would not change the test itself.

This distinction is well-illustrated by the decision in *Miami Herald Publishing Co. v. Tornillo*. There, the Court, while recognizing that many localities have only one newspaper, 418 U.S. at 249 & n.13, made clear that laws ordering publication of designated material must be reviewed according to the most exacting First Amendment standard. The proponents of an enforced right of access in *Tornillo* pointed to "dominant features of a press that has become noncompetitive and enormously powerful," manifested by such characteristics as "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns" and a "monopoly controlled by the owner of the market" (*id.* at 249, 251). But the Court nonetheless gave strict scrutiny to the law mandating access, holding that indicia of economic concentration were insufficient to uphold that access or to justify governmental intrusion upon the editorial function. *Id.* at 256, 258.

Finally, the district court pointed out that the federal government has allowed cable systems to retransmit broadcast signals without consent pursuant to a program of compulsory copyright licensing. Again, however, that fact does not justify a departure from strict review of the must-carry law. Even if the right to retransmit broadcast signals were regarded as a government benefit,[27] and

[27] Prior to enactment of the Copyright Revision Act of 1976, the retransmission of broadcast signals, local or distant, was not considered a public performance under the general copyright law. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-10 (1984) (discussing Copyright Revision Act of 1976). Thus, the revised law providing the compulsory license to cable operators left them no better off with respect to retransmission of local broadcast signals, and worse off with respect to distant signals, than they had been before.

even if the must-carry obligation were regarded as an (unexpressed) "condition" on that benefit, the condition would be invalid. Whatever power the government may have to attach new conditions to a *continuing* benefit—giving the recipient the choice of refusing the benefit and thus avoiding the condition—it cannot impose requirements on the basis of a benefit that is no longer being received. Yet, in the same legislation that imposed the must-carry obligation, Congress revised the law to require that, with respect to commercial broadcast stations not exercising their must-carry rights, cable operators must obtain consent to carry their signals. Thus, any after-the-fact effort to tie must-carry requirements to a right to carry local commercial stations without consent comes too late.[28]

II. THE ASSERTED INTERESTS IN PROMOTING DIVERSITY OF SPEECH AND IN PRESERVING LOCAL BROADCASTING ARE NOT SUFFICIENT, IN LAW OR IN FACT, TO JUSTIFY THE MUST-CARRY REQUIREMENTS

A law directly regulating the content of protected speech carries a strong presumption of unconstitutionality, *see R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. at 2542, and, to sustain it, the government "must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 112 S. Ct. at 1851 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). *See also Sable Communica-*

[28] Although the Court, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), recognized that the retransmission of broadcast signals was a sufficient basis for the FCC to exert regulatory authority over cable television, that decision sheds no light on the issues here. The Court did not address "the validity of the specific rules promulgated by the Commission for the regulation of CATV," 392 U.S. at 167, and did not consider any question regarding whether particular restrictions were compatible with the First Amendment.

tions, 492 U.S. at 126. The government cannot come close to making that demanding showing here. But, even if the proper standard were the more lenient standard applied by the district court, the defense of the statute would fail. At the very least, the government would need to demonstrate that the law furthers a significant interest and is narrowly tailored to serve that interest. *See* J.S. App. 23a (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Here, however, there is no real evidence that the system of local broadcasting has been put in serious jeopardy, and, if it had been, Congress could address the problem through the far less intrusive means of providing direct financial subsidies rather than compelling cable operators to support speech that they do not wish to carry. *See generally Texas v. Johnson*, 491 U.S. at 418 (noting that "[i]t is not the State's ends, but its means, to which we object").

A. The Interest in Promoting Diversity of Speech Does Not Justify the Extraordinary Means of Compelling Speech

There is nothing unusual about the government defending a law that compels speech on the grounds that it regards the compelled speech as important and that, absent regulation, the speech will not be heard by a sufficiently broad audience. At some level, the notion that favored speech is of particular importance, and will not otherwise be adequately heard, lies behind *every* instance of compelled speech, or the government would not bother to compel it. *See, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. at 798 (noting state argument about "the importance of informing donors how the money they contribute is spent"). Were that interest regarded as sufficient, therefore, little would be left of the First Amendment protection against compelled speech.

This kind of justification also has a dubious foundation: the very reason that compelled speech is subject to

a high level of scrutiny is the conviction that it is fundamentally improper for government to insist that private parties utter speech favored by the government. As we have said (*see* pages 17-18 *supra*), that kind of compulsion is just the mirror-image of laws prohibiting speakers from saying what they wish to say. In both instances—censorship and compelled speech—the government is insisting that its preferences, not those of private parties, should be transcendent in the marketplace for speech. If that purpose is not enough to justify censorship of speech, as it plainly is not, it should fare no better as a basis for compelling speech. *See Riley v. National Fed'n of the Blind*, 487 U.S. at 797 (noting "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression").

To prevail under the compelling-interest test, therefore, the government must do more than express its views about the prohibited or compelled speech *as speech*: it must show that the speech to be compelled, or the speech to be silenced, is tied to some interest *other than* an interest in favoring or disfavoring the speech. The Court, for example, has upheld regulation of protected speech that threatens the exercise of "the right to vote freely and effectively." *See Burson v. Freeman*, 112 S. Ct. at 1856. Likewise, the Court has indicated that courts may prohibit speech that poses a clear and present danger to the fair conduct of judicial proceedings. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). But while Congress did include among its findings that local broadcast stations provide "local news and public affairs programming and other local broadcast services critical to an informed electorate," Findings ¶ 11, that general statement falls well short of a showing that, in the absence of mandatory carriage, the right to vote will be seriously threatened. The asserted interest in promoting diversity of speech is thus properly treated as an interest in the advancement of the speech itself, not in the protection of other constitutional rights.

Congress has also failed to show that the compulsion of the must-carry law will actually promote diversity of speech in any meaningful way. While the law guarantees that the speech of certain speakers will be available to cable subscribers, it assures that the speech of other speakers (those displaced by broadcast stations) will not. It hardly seems obvious that the forced carriage of little-watched broadcast stations—the programming most likely to be advanced by the must-carry law—adds to diversity of speech when the price of its carriage is the silencing of, for example, newer, less established cable channels. This is particularly so given the fact that the programming of broadcast stations is available to viewers through over-the-air transmission, while the programming of cable networks is not. *See also* J.S. App. 58a (Williams, J., dissenting) (expressing doubt that must-carry law "will increase program diversity *at all*").

It is, likewise, hard to reconcile the notion that carriage of broadcast stations is essential to diversity of speech with the decision by Congress to grant local commercial broadcast stations the newly-established right to *refuse* carriage on cable systems. As we have noted, *see* pages 8, 34 *supra*, the law prior to enactment of the 1992 Cable Act assured that any cable system wishing to carry a local broadcast station could do so without obtaining consent. Now, however, Congress has provided each local commercial station with a veto—exercisable solely at its own discretion—over carriage of the station in the local market. Thus, for all its claimed interest in diversity of speech, Congress has fashioned a law that, looked at in its entirety, makes that interest wholly subordinate to the unilateral preferences of the stations themselves.

B. The Must-Carry Law Does Not Protect Against Any Genuine Threat to the System of Local Broadcasting

The second justification for the must-carry law—that carriage of local broadcast stations is necessary to preserve a strong system of local broadcasting—is inade-

quate to justify it for at least two reasons. First, even if we assume *arguendo* that the interest is of sufficient magnitude, the record does not support the necessary predicate: that the system of local broadcasting is in genuine peril. *See, e.g., Burson v. Freeman,* 112 S. Ct. at 1851 (rules must be "necessary to serve [asserted] interest") (internal quotation marks omitted); *see Century Communications Corp. v. FCC,* 835 F.2d at 300 ("speculative fears alone have never been held sufficient to justify trenching on first amendment liberties"). Second, even if the economic concerns were less speculative, Congress could address them by providing direct financial assistance, as it does for other speech that it wishes to advance.

1. Before turning to the congressional findings, we note that the district court gave them a wholly unwarranted degree of deference. This Court has stressed that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978); *see also Sable Communications,* 492 U.S. at 129; *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 915 (1982). Indeed, were the courts barred from going behind the surface of congressional findings, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." 435 U.S. at 844; *see also Lamprecht v. FCC,* 958 F.2d 382, 392 n.2 (D.C. Cir. 1992). The Court has thus made clear that "whatever deference is due legislative findings would not foreclose [this Court's] independent judgment of the facts bearing on an issue of constitutional law . . . ." *Sable Communications,* 492 U.S. at 129. That independent judgment is particularly necessary here, given that prior must-carry rules have twice been found to have little grounding in fact, *see* pages 4-5 *supra,* and that, with respect to any concern about the future of local broadcasting, the current rules are prophylactic, not corrective, in nature. *See NAACP v. Button,* 371 U.S. 415, 438 (1963) (citations omitted) ("[b]road

prophylactic rules in the area of free expression are suspect").

Although the Court has at times spoken of giving deference to Congress' factual findings, *see Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 331 n.12 (1985); *Metro Broadcasting, Inc. v. FCC,* 497 U.S. at 569, and done so even where the law was subject to elevated standards of review, we think that the proper level of deference given to Congress varies inversely with the level of judicial scrutiny given to its actions. The usual reason for heightened scrutiny of any sort is that legislation with respect to particular subjects (*e.g.,* speech), or based on particular grounds (*e.g.,* race or gender), is especially likely to cross constitutional boundaries. It seems inconsistent with the need for heightened scrutiny of legislative action to say, at the same time, that the justifications offered to support the legislation are to be treated with great deference. As judicial concern about the nature of legislation increases, judicial deference to legislative findings should decrease.

2. At the very least, however, the Court should not foreclose "independent judgment" of the grounds for the asserted interest. If that review is given here, it is readily apparent that the need to protect local broadcasting has not been even remotely established. Congress itself found that "the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcast signals]." Findings ¶ 19. Not surprisingly, therefore, following the invalidation of the original must-carry rules in *Quincy Cable,* cable operators did not elect to drop local broadcasters to any significant degree. Indeed, the FCC survey said by Congress to show "a serious problem," S. Rep. No. 92, 102d Cong., 1st Sess. 43 (1991), actually found that only one in five cable operators had refused carriage to even one broadcast station within the scope of the survey. *See* FCC Mass Media Bureau, *Cable Sys-*

tem Broadcast Signal Carriage Survey Report 10 (Sept. 1, 1988) (filed by NAB as Attachment B to Affirmation of Jack N. Goodman).[29] As the House Report acknowledges, "[t]he Committee has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations . . . ." H.R. Rep. No. 628 at 52. *See also* J.S. App. 63a; NCTA's Statement of Material Facts as to Which There Is No Genuine Issue ¶ 8, JA. 215 (the average U.S. cable system actually carried *more* local broadcast signals in 1990 than in 1986).

The system of local broadcasting, in fact, has flourished in the years since invalidation of the must-carry rules in *Quincy*: "the number of commercial broadcast stations has increased by 22% (from 919 to 1118), the number of educational broadcast stations by 15% (from 316 to 363), and the number of cities receiving broadcast television by 16% (from 514 to 594)." *See* J.S. App. 62a (Williams, J., dissenting) (citing NCTA's Statement of Material Facts ¶¶ 12-14, J.A. 216.)[30] This significant expansion took place at least partially *because of* the growth of cable television, and despite the purported "economic incentive" of cable operators "to delete, reposition, or not carry local broadcast signals." Findings ¶ 16. That incentive, to the extent that it exists at all, is thus clearly

[29] Overall, as Congress observed, the survey indicated a nationwide total of "3,600 instances" of noncarriage of a local station, S. Rep. No. 92 at 43, but that number actually amounts to a noncarriage rate of 5% (approximately 8500 cable systems were then carrying an average of eight broadcast stations each). *See* J.S. App. 64a (Williams, J., dissenting); *Cable System Broadcast Signal Carriage Survey Report* 4; NCTA's Statement of Material Facts as to Which There is No Genuine Issue ¶ 18, J.A. 217.

[30] The fact that broadcast stations are increasing in number would seem fatal to the theory that cable operators maintain, and will exploit, a "bottleneck" over transmission of video programming. The proliferation of broadcast stations indicates either that transmission by cable systems is not essential to their success or that cable systems are willingly carrying the great majority of them. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.2, at 847 (1992 Supp.).

overcome by the economic incentive to carry the vast majority of broadcast signals.

It is also highly likely that, if a significant segment of broadcast television were not available on local cable systems, consumers would then return to use of antennas (along with inexpensive switching devices), which would make available both cable programming and over-the-air broadcast programming. While it is true, as Congress found, that this technology is not used when the overwhelming majority of broadcast stations *are* voluntarily carried on cable systems, it hardly follows that it would not be used if broadcasting—"the most popular programming on cable systems" (Findings ¶ 19)—were otherwise massively unavailable. *See* J.S. App. 66a (Williams, J., dissenting). To the contrary, "[c]ommon sense suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations." *Century Communications*, 835 F.2d at 301 (internal quotation marks omitted).

The district court also gave little consideration to the availability of other means of preserving the system of local broadcasting. For example, if local broadcasters ever faced genuine financial hardship, Congress could provide subsidies to the stations, as it does in partial form now through the grant of free broadcast licenses. *See* J.S. App. 66a (Williams, J., dissenting). That is the course followed by Congress with respect to the Corporation for Public Broadcasting, and, were local stations faced with a shortfall in advertising revenues resulting from a reduced audience, Congress could similarly give direct grants to the stations themselves. The must-carry law, however, requires *cable operators* to provide the subsidy for broadcast stations—and to provide it for *all* broadcast stations, whether in jeopardy or not. That approach imposes a far less tailored, and far more invasive, solution to this as-

serted problem. *See, e.g., Keller v. State Bar,* 110 S. Ct. 2228 (1990) (striking down requirement that members involuntarily subsidize speech of organization).

The must carry provisions thus cannot be upheld on the basis of Congress' repeated, but quite implausible, finding that, without them, the system of free local broadcasting "will be seriously jeopardized." Findings ¶ 16. That system has thrived, and there is no reason to think that it will not continue to thrive under a regime of voluntary carriage. And if that situation should change, then cable subscribers wanting those programs can certainly find alternative, readily available, means of getting them. *See Century Communications,* 835 F.2d at 303 ("both the Federal Trade Commission and the Department of Justice have concluded, in separate reports, that the absence of must-carry would not harm local broadcasting") (citations omitted). Congress has simply elected a highly intrusive—and, ultimately, unconstitutional—solution to a problem that does not exist.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted,

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